No. 88-6613

FILED

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

[redacted],

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA

Respondent.

BRIEF IN THE MERITS

[redacted], Attorney General
[redacted] of California
[redacted], Chief Assistant
[redacted]
[redacted], Senior Assistant
[redacted]
[redacted] Supervising
[redacted] General
[redacted], JR., Supervising
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619)237-7766

Attorneys for Respondent

QUESTIONS PRESENTED

1. Did the penalty phase of petitioner's capital case violate the Eighth and Fourteenth Amendments by precluding jury consideration of petitioner's mitigating background and character evidence, where the jury was instructed to consider a list of 11 factors in aggravation and mitigation, the last of which was a "catchall" factor which permitted the jury to consider "any other" circumstance which extenuated the gravity of the crime even though it was not a legal excuse for the crime, and where the other instructions, the nature of both the prosecution and defense evidence and the arguments of counsel made it clear that the jury was free to consider petitioner's evidence in mitigation?

2. Do the Eighth and Fourteenth Amendments preclude a trial court from instructing a penalty phase jury in a

capital case that it "shall" impose a sentence of death if it concludes that aggravating circumstances outweigh mitigating circumstances, where under California's weighing law each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, and in so doing determines the appropriate sentence?

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STATEMENT OF THE CASE

A jury convicted petitioner[1] of robbery and kidnapping for the purpose of robbery of a gas station attendant in Riverside, California. (Cal. Pen. Code, §§ 209, subd. (b), 211.) The jury also convicted petitioner of the robbery, kidnapping for the purpose of robbery and the first degree murder of Dick Gibson, a 7-Eleven store clerk, in Riverside. (Cal. Pen. Code, §§ 187, 189, 209, subd. (b), 211.) The jury made a special finding that petitioner personally killed the victim. The jury also found both charged special circumstances to be true (murder during the commission of a robbery [Cal. Pen. Code, § 190.2, subd. (a)(17)(i)], and murder during the commission of a kidnapping for the purpose of robbery

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1. Petitioner was tried jointly with codefendant Carl Ellison, petitioner's younger nephew. Ellison waived jury trial and was tried by the court. (CT 218.)

[Cal. Pen. Code, § 190.2, subd. (a)(17)(ii)]). (CT 367-379.)[2/]

Following the penalty phase, the jury fixed the penalty at death. (CT 549.)

On automatic appeal, the California Supreme Court affirmed the judgment. (People v. Boyde (1988) 46 Cal.3d 212, 250 Cal.Rptr. 83, 758 P.2d 25; a copy of the opinion of the California Supreme Court is attached as Appendix A to the petition for certiorari.)

Petitioner's petition for rehearing was denied on November 9, 1988, in an unpublished order. (Attached as Appendix B to the petition for certiorari).

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2. "CT" refers to the Clerk's Transcript. "RT" refers to the Reporter's Transcript.

STATEMENT OF FACTS

Prosecution Evidence: Guilt Phase

A. The Robbery and Kidnapping of Lon Creech[3/]

During the early morning hours on July 13, 1976, at gunpoint petitioner and another man robbed Mr. Lon Creech, the nightclerk at a 7-Eleven market in Riverside. (RT 2315-2319.)

Mr. Creech was placed in the trunk of his car and driven around, as petitioner talked about putting a .22 caliber bullet in Mr. Creech's head, or driving the car over a cliff with Mr. Creech in the trunk. Petitioner drove to an orange grove, ordered Mr. Creech to walk down the dirt road, and, gun in hand, told Mr. Creech to kneel down. After asking if Mr. Creech wanted a cigarette, petitioner told Mr. Creech not to turn

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3. The robbery and kidnapping of Mr. Creech involved uncharged offenses admitted as modus operandi evidence.

around, then left in Mr. Creech's car. (RT 2315-2325.)

B. The Robbery and Kidnapping of David Baker

At about 2:00 a.m. on January 5, 1981, petitioner robbed a Riverside gas station attendant, Mr. David Baker. Finding the trunk of Mr. Baker's car too small to fit Mr. Baker, petitioner ordered him to drive to a park with some orange trees. (RT 2392-2403.) Petitioner told Mr. Baker to walk toward some rocks, and kept saying he did not know what he was going to do with him. After about 10 minutes, petitioner ordered Mr. Baker back in the car. After stopping at a doughnut shop, petitioner fled. (RT 2392-2408.)

C. The Robbery, Kidnapping, and Murder of Mr. Gibson

On January 14, 1981, Mr. Dick Gibson was working as the clerk on the late night shift at the same 7-Eleven

store where Mr. Creech was robbed. (RT 2382-2383.)

When the owner arrived at 5:00 a.m., on January 15, 1981, Mr. Gibson was missing. Some money and items had been taken, and there was an apparent bullet hole in the store window. (RT 2383-2384, 2437-2440.)

A few hours later, Mr. Gibson's body was found in an orange grove. (RT 2483-2485.)

Mr. Gibson died from a bullet wound above the right ear. There was a second bullet wound in the forehead, fired from less than sixteen inches away. There were also gunshot wounds to the fingers of the right hand. Physical evidence was consistent with Mr. Gibson having fallen while running, and then kneeling at another location. (RT 2523-2545, 2761-2764.)

Mr. Baker identified a photo of petitioner, and property from the Baker robbery was recovered from petitioner's residence. (RT 2573-2575.) Petitioner initially denied the Baker robbery, but when the detective said, "I've got you," petitioner was silent a moment, then agreed, "You got me." (RT 2582-2584.)

Petitioner told Detective Callow, "I can't go back to jail," and asked if there was anything he could do to keep from returning to prison. Detective Callow said he could make no commitments. Petitioner asked, "What if I have information about a murder?" (RT 2585-2587.)

Petitioner said he had information about the murder of the football coach [Mr. Gibson] at the 7-Eleven market. Petitioner, who was 24 years old, initially claimed he was not present but knew that someone named "Big

Mike" and petitioner's 18 year old nephew, Carl Ellison, had committed the robbery and murder. (RT 2587-2593, 2825.)

Petitioner then changed his story and said he and Carl sat in the car while "Big Mike" entered the store, robbed the clerk and then told Carl to drive to an orange grove. As petitioner and Carl sat in the car, "Big Mike" ordered the clerk to get on his knees and put his hands on top of his head. "Big Mike" then shot the clerk. After the first shot, the clerk dropped his hands and turned partially around. "Big Mike" fired a second shot and the clerk dropped straight forward to the ground. "Big Mike" then rolled the clerk over and, from point-blank range, shot the clerk in the head. (RT 2633-2654.)

After additional questioning, petitioner admitted there was no such person as "Big Mike," and that he and Carl

had committed the robbery. (RT 2687-2688.) Petitioner blamed the robbery and killing on Carl. They entered the store and Carl robbed the clerk, then ordered him into the car. The clerk jumped out of the car and ran and fell. Carl pursued him and brought him back. (RT 2688-2707.)

Petitioner drove to the area of an orange grove. Carl ordered the clerk to get on his knees and to put his hands over his head. The man was pleading for Carl not to hurt him. Carl told him to be quiet and to face the orange trees. Petitioner backed up and began to walk around and make sure no one else was in the area. Carl then fired a shot. The clerk took his hands from his head, and looked at his hand. Carl then fired a second shot into the back of the clerk's head. The clerk fell forward. Carl said he was not sure the man was dead, rolled him over, stood over him, and fired

another shot into his head. (RT 2707-2723.)

A shoeprint found by police near the victim's head was consistent with petitioner's foot size and inconsistent with Ellison's. Footprints attributable to Ellison were all below waist level of the body and at least four-and-a-half feet away from it. (RT 2500-2513, 2771-2778, 2784-2785, 2790-2791.)

Otharaean Owens, the mother of Carl Ellison and half-sister of petitioner, testified that she saw petitioner while he was in jail. She confronted him with the fact that he knew Carl would not kill anyone. Petitioner admitted that Carl was not involved in the killing. (RT 2824, 2832-2833.)

Codefendant Ellison testified at trial that petitioner planned the robbery and shot the victim. (RT 2962-2992.) Ellison initially lied to the police and

said he had shot the victim, before admitting petitioner was the one, because he loved his uncle (petitioner) and did not want him to go back to prison. (RT 2996-2999, 3249-3272.)

Defense Evidence: Guilt Phase

Petitioner testified that Ellison planned the robbery and killed Mr. Gibson. (RT 3422-3494.)[4/]

Prosecution Evidence: Penalty Phase

On June 13, 1974, petitioner threw bricks at a van being driven down the street by a woman with two small babies inside. (RT 4042-4044.)

On June 14, 1974, petitioner hit a high school girl with his fist on the back of her neck as she was walking to her class. (RT 4025-4027, 4034-4037.)

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4. The jury made a special finding, beyond a reasonable doubt, that petitioner personally killed the victim. (CT 379.)

Petitioner's parole officer testified that petitioner consistently failed to report to him as required, failed to adhere to his parole conditions, failed to make diligent efforts to find work, lied to him and generally failed to make "any effort to rehabilitate himself or engage in any kind of productive conduct." (RT 4061-4068.)

Petitioner committed five separate armed convenience store robberies during June and July of 1976. (Katherine Hagen-RT 4126-4129; Mark Page-RT 4132-4136; Timothy Hanks-RT 4140-4145; Charles Skalf-RT 4148-4158, 4186-4188; Edward Wall-RT 4163-4173.)

Petitioner planned an escape from jail during the trial of the charges in the present case, and to kill a jail guard if necessary. (RT 4190-4217, 4243-4245, 4269-4281.)

Penalty Phase-Defense Evidence

Petitioner came from a poor family, and did not know his real father. (RT 4421, 4488-4493, 4499-4503, 4576-4577.) He had impetigo and low blood pressure when he was young. (RT 4434, 4497-4499.) He did poorly in school, was truant and got in trouble with the law, but could not needed help. (RT 4513-4524, 4443, 4524-4526, 4578-4583, 4595.)

Petitioner wanted to make it on parole and get a job, but no one would give him a chance. (RT 4598, 4601-4602.)

Petitioner's family testified he was a giving person and treated his family well. (RT 4418-4419, 4423, 4426, 4442, 4451-4452, 4537, 4552-4559, 4600-4601, 4606-4608, 4613-4614, 4620-4623.)

Two psychologists testified petitioner has an inadequate personality, limited internal resources and low self-esteem. (RT 4306-4365, 4650-4707.)

SUMMARY OF ARGUMENT

The instructions permitted the jury to consider and give independent weight to petitioner's background and character evidence in mitigation. (Lockett v. Ohio (1978) 438 U.S. 586 (plur. opn.); Eddings v. Oklahoma (1982) 455 U.S. 104.)

In considering the constitutionality of the instructions, the Court determines "what a reasonable juror could have understood the charge as meaning." (California v. Brown (1987) 479 U.S. 538, 541.)

Petitioner's contention involves an unreasonable and "hypertechnical" interpretation of the jury instructions that would transform a seven day penalty phase trial into a "charade." (Id., at p. 542.)

Petitioner's jury was instructed to "take into account and be guided by" a

lengthy list of 11 factors, the last of which was the "catchall" factor (k), which permitted the jury to consider "any other" possible circumstance in mitigation which "extenuates" the "gravity" of the crime, even circumstances that did not constitute any kind of "legal excuse" for the crime.

The California Supreme Court has characterized factor (k) as an "open-ended, catchall provision, allowing the jury's consideration of any mitigating evidence" offered by a defendant as a basis for a sentence less than death. (People v. Brown (1985) 40 Cal.3d 512, 541 (rev'd on other grounds, California v. Brown, supra, 479 U.S. 538), citing People v. Easley (1983) 34 Cal.3d 858, 878.) The jury would have similarly understood factor (k) as a "catchall" factor not limited to "legal" excuses, under which it was to consider "any other" mitigating factors, including petitioner's background

and character that, in the exercise of its moral judgment, might point toward a life sentence rather than death.

Factor (k) in CALJIC No. 8.84.1 tracks the identical language of California Penal Code section 190.3, factor (k), and no more violates Lockett than the statute, which was upheld on its face in California v. Ramos (1983) 463 U.S. 992, 1005, fn. 19. In Pulley v. Harris (1984) 465 U.S. 37, the Court upheld the 1977 version of California's death penalty law, which contained the identical language of factor (k), in what was then labeled factor (j).

Moreover, the validity of factor (k) cannot be determined in the abstract, but must be analyzed in light of the other instructions, the facts presented at the penalty phase, and the arguments of counsel. (California v. Brown, supra, 479 U.S. 538.)

Reasonable jurors would have known from the instruction to consider "all of the evidence" (RT 4831; J.A. 33), the nature of the other factors on which the jury was instructed, the fact that not only all of petitioner's evidence but all the prosecution's evidence consisted solely of background and character evidence, and the arguments of counsel, that they were free to consider and weigh petitioner's background and character evidence.

The jury was, therefore, fully able to express its "reasoned moral response" to all the evidence before it. (Penry v. Lynaugh (1989) ___ U.S. ___, 57 U.S.L.W. at 4965 (plur. opn.).)

California law provides that after weighing the circumstances in aggravation and mitigation, the jury "shall" impose a sentence of death if it concludes that "the aggravating

circumstances outweigh the mitigation circumstances." (Cal. Pen. Code, § 190.3.)

The provision that the jury "shall" impose a sentence of death is consistent with the Court's requirement that jury discretion must be channeled in order to provide reasoned decisions rather than capricious or purely emotional ones. (California v. Brown, supra, 479 U.S. 538, 542-543; Gregg v. Georgia (1976) 428 U.S. 153, 188-189; Zant v. Stephens (1983) 462 U.S. 862, 874; Franklin v. Lynaugh (1988) 487 U.S. ___, 101 L.Ed.2d 155, 170-171; Gardner v. Florida (1977) 430 U.S. 349, 358; Furman v. Georgia (1972) 408 U.S. 238.)

The Court upheld use of a mandatory weighing process in Proffitt v. Florida (1976) 428 U.S. 242, and another type of mandatory process in Jurek v. Texas (1976) 428 U.S. 262, 269. (See

Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at 169-171 (White, J. plur.), 172 (O'Connor, J. conc.).)

The Court upheld the California law in California v. Ramos, supra, 463 U.S. 992, and an earlier version in Pulley v. Harris, supra, 465 U.S. 37. (See also California v. Brown, supra, 479 U.S. 538, 540 (fn. *).)

Requiring the jury to return a penalty verdict consistent with its application of the weighing process can serve the "useful purpose" of precluding consideration of extraneous emotional factors unrelated to the evidence. (California v. Brown, supra, 479 U.S. at 543.) It ensures that the death penalty will be imposed "with regularity," rather than "freakishly or rarely." (Proffitt v. Florida, supra, 428 U.S. 242, 260 (White, J. conc.); Jurek v. Texas, supra, 428 U.S. 262, 278-279 (White, J. conc.), and serves

to "minimize the risk of wholly arbitrary and capricious action.") (Gregg v. Georgia, supra, 428 U.S. at pp. 188-189; see also Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at pp. 170-171; Zant v. Stephens, supra, 462 U.S. 862, 874; Gardner v. Florida, supra, 430 U.S. 349, 358.) It also promotes the rational and predictable administration of death penalty laws. (California v. Brown, supra, 479 U.S. at 541.)

By requiring the jury to return a sentence consistent with its application of the weighing process, California law provides a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." (Furman v. Georgia, supra, 408 U.S. 238, 313 (White, J. conc.).) It also fosters reliability and furthers judicial review. (California v. Brown, supra, 479 U.S. at p. 543.)

Since under California law each juror "is free to assign whatever moral or sympathetic value he deems appropriate" to each of the factors, including factor (k), (People v. Brown, supra, 40 Cal.3d at p. 541), the jury under California law makes an "individualized assessment of the appropriateness of the death penalty" as required by the Eighth and Fourteenth Amendments. (Penry v. Lynaugh, supra, ___ U.S. at ___, 57 U.S.L.W. at 4962.)

The Court has previously construed the California procedure as one in which "appropriateness" is determined as part of the weighing process. (California v. Brown, supra, 479 U.S. 538, 540.)

Both counsel made it clear to the jury in argument that the weighing process was not to be performed mechanically, and that it called for an

exercise of jury discretion and a moral assessment of the weight of the factors.

Neither a separate jury determination of "appropriateness" apart from the state's statutorily prescribed process, nor a jury determination of the "absolute weight" of the factors in aggravation is constitutionally required. (Proffitt v. Florida, supra, 428 U.S. 242; Jurek v. Texas, supra, 428 U.S. 262; Pulley v. Harris, supra, 465 U.S. 37; Zant v. Stephens, supra, 462 U.S. 862.)

Petitioner's argument is an unwarranted extension of this Court's jurisprudence. The Constitution requires no more than a rational state procedure which narrows the class of death eligible defendants and provides for the consideration of aggravating and mitigating factors and the exercise of some jury discretion in that process. (Lowenfield v. Phelps (1988) 484 U.S. ___,

98 L.Ed.2d 568, 583.) Petitioner's argument would engraft a third requirement of "unbridled discretion" for sentencers. To do so would improperly intrude into California's procedure for channeling and guiding sentencer discretion that is part of California's "effort to achieve a more rational and equitable administration of the death penalty." (Franklin v. Lynaugh, supra, 487 U.S. ___, 101 L.Ed.2d 155, 170.)

Moreover, even assuming, arguendo, any federal constitutional error in the instructions, it was at most harmless error. (Hitchcock v. Dugger (1987) 481 U.S. 393, 399; Satterwhite v. Texas (1988) 486 U.S. 249; Chapman v. California (1986) 386 U.S. 18.)

ARGUMENT

I

THE INSTRUCTIONS TOLD THE JURY TO WEIGH ANY MITIGATING EVIDENCE OFFERED BY PETITIONER

Petitioner contends that the jury was improperly restricted by CALJIC[5] No. 8.84.1 (RT 4831-4833; J.A. 33-34)[6] in its consideration of circumstances in mitigation of penalty, because the "catchall"[7] factor (k) portion of the

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5. CALJIC is an acronym for standard jury instructions used in criminal cases in California. The instructions are drafted by a committee of California judges.

6. The language of the instruction is an exact copy of the pertinent portion of California Penal Code section 190.3. In addition, the parties "agreed upon" a definition of "extenuate," which was given to the jury. (RT 4789, 4833; J.A. 26, 34.)

7. The California Supreme Court has repeatedly characterized factor (k) as a "catchall" provision. (See e.g. People v. Dyer (1988) 45 Cal.3d 26, 83, cert. den., 102 L.Ed.2d 347 (1988); People v. Belmontes (1988) 45 Cal.3d 744, 807, cert. den., 102 L.Ed.2d 980

instruction referred to "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," and thereby precluded the jury from considering petitioner's background and character evidence in mitigation, which was not immediately related to the crime.

A capital defendant must be permitted to present, and the trier of penalty must be free to consider and give independent weight to, any relevant mitigating evidence regarding the defendant's character or record and any

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(1989); People v. Brown (1985) 40 Cal.3d 512, 541, rev'd on other grounds California v. Brown (1987) 479 U.S. 538.)

Petitioner's counsel referred in his argument to factor (k) as the "catchall" provision which encompassed any other factor in mitigation which did not necessarily fit within one of the other categories, and which permitted the jury to look at petitioner "in his totality" and "as a human being" and "an individual." (RT 4829-4831; J.A. 31-33.) (See People v. Boyde (1988) 46 Cal.3d 212, 251.)

circumstances of the offense. (Lockett v. Ohio (1978) 438 U.S. 586 (plur. opn.); Eddings v. Oklahoma (1982) 455 U.S. 104; Skipper v. South Carolina (1986) 476 U.S. 1, 4-5; Mills v. Maryland (1988) 486 U.S. ___, 100 L.Ed.2d 384; Sumner v. Shuman (1987) 483 U.S. 66, 97 L.Ed.2d 56; Hitchcock v. Dugger (1987) 481 U.S. 393; Penry v. Lynaugh (1989) ___ U.S. ___, 57 U.S.L.W. 4958.) A state nevertheless has a legitimate "role in structuring or giving shape to the jury's consideration of these mitigating factors." (Franklin v. Lynaugh (1988) 487 U.S. ___, 101 L.Ed.2d 155, 169 (plur. opn.).)

Petitioner's contention involves an unduly narrow and "hypertechnical" construction of the so-called "unadorned" factor (k)[8/] in particular, and the jury

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8. The California Supreme Court refers to language in the "literal terms of [California Penal Code] section 190.3, factor (k)" as the "unadorned" factor (k). (See, e.g., People v.

Allison (1989) 48 Cal.3d 879, 900, mod. 49 Cal.3d 38c.) It was the "unadorned" factor (k) which was given in this case. Subsequent to petitioner's trial, the California Supreme Court impliedly held in People v. Easley (1983) 34 Cal.3d 858, that instruction in the unadorned language of California Penal Code section 190.3(k) "was not unconstitutional," but nevertheless directed trial courts thereafter to clarify factor (k) by adding the specific language of Lockett and Eddings that it was free to consider "any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'" (Id., at p. 878, fn. 10.)." (People v. Poggi (1988) 45 Cal.3d 306, 346, cert. den., 106 L.Ed.2d 606 (1989).)

In People v. Brown, supra, 40 Cal.3d 512, 544, fn. 17, the California Supreme Court announced that as to cases in which the jury had been instructed in the language of the unadorned factor (k), it would examine each such appeal on its merits "to determine whether the jury may have been misled to the defendant's prejudice. (40 Cal.3d at p. 544, fn. 17.)" (People v. Poggi, supra, 45 Cal.3d at p. 346.) In conducting such examination, the California Supreme Court examines "the instructions and arguments as a whole to determine whether the jury was adequately informed of the proper scope of mitigating evidence." (People v. Allison, supra, 48 Cal.3d at p. 899, citing California v. Brown (1987) 479 U.S. 538, 546 (conc. opn. of O'Connor, J.); see also People v. Poggi, supra, 45 Cal.3d at p. 346.)

instructions at the penalty phase as a whole, and would turn the penalty phase of the trial into a "virtual charade." (California v. Brown, supra, 479 U.S. 538, 542.)

The test is "what a reasonable juror could have understood the charge as meaning." (Id., at p. 541, quoting Francis v. Franklin (1985) 471 U.S. 307, 315-316.) "To determine how a reasonable juror could interpret an instruction, we 'must focus initially on the specific language challenged.' Francis v. Franklin, 471 U.S., at 315. If the specific instruction fails constitutional muster, we then review the instructions as a whole to see if the entire charge delivered a correct interpretation of the

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In affirming the judgment in this case, the California Supreme Court did just that. (People v. Boyde, supra, 46 Cal.3d at p. 251.)

law. Ibid." (California v. Brown, supra, 479 U.S. at p. 541.)

In California v. Brown, supra, 479 U.S. 538, every justice of the Court indicated an instruction cannot be evaluated in the abstract. Rather, an instruction must be analyzed in light of the facts presented at the penalty phase and other instructions (California v. Brown, supra, 479 U.S. at p. 542 [Chief Justice Rehnquist, joined by Justices White, Powell and Scalia]) or in light of arguments of counsel and the other instructions (Id., at p. 546 [O'Connor, J., concurring]), (Id., at pp. 547-563 [Brennan, Marshall, Stevens, Blackmun, JJ., dissenting].) (See also Mills v. Maryland, supra, 486 U.S. ___, 100 L.Ed.2d 384, 406 [Rehnquist, C.J., dissenting.].)

California Penal Code section 190.3[9/] provides that evidence may be presented by both the people and the defendant as to any matter relevant to mitigation and sentence including, but not limited to ". . . the defendant's character, background, history, mental condition and physical condition."

The California Supreme Court has rejected petitioner's construction of factor (k), and has characterized factor (k) as an "open-ended, catchall provision, allowing the jury's consideration of any mitigating evidence" offered by a defendant as a basis for a sentence less than death. (People v. Brown, supra, 40 Cal.3d at p. 541, citing People v. Easley, supra, 34 Cal.3d 858, 878.)

In California v. Ramos (1983) 463 U.S. 992, this Court held that Ramos

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9. All statutory references are to the California Penal Code unless otherwise indicated.

could not successfully contend "that the California sentencing scheme violates the directive of Lockett v. Ohio, 438 U.S. 586 (1978)," since it "permits the defendant to present any evidence to show that a penalty less than death is appropriate in his case." (California v. Ramos, supra, 463 U.S. at p. 1005, fn. 19; see also California v. Brown, supra, 479 U.S. 538, 540 (fn. *).)

Similarly, in Pulley v. Harris (1984) 465 U.S. 37, after quoting in full the various factors to be considered in aggravation and mitigation under California law (Id., at p. 52, fn. 14), including what was factor (j) under the 1977 law, and is now the unadorned factor (k) under the 1978 law, the Court upheld California's system on its face as providing "suitably directed and limited" jury discretion, citing Gregg v. Georgia

(1976) 428 U.S. 153, 189. (Pulley v. Harris, supra, 465 U.S. at p. 53.)

The Court's reading of California's 1978 death penalty law on its face in Ramos, including the unadorned factor (k), and its reading of the identical factor (j) from the 1977 law, quoted in Pulley v. Harris, manifestly did not suggest to the Court that jurors were precluded by the language of the statutory factors from considering any evidence offered by a defendant in mitigation (California v. Ramos, supra, 463 U.S. at p. 1005, fn. 19), and it cannot be assumed that reasonable jurors would understand the identical language of the instructions in this case any differently.

Since the wording of Penal Code section 190.3, subdivision (k) is identical to the wording of CALJIC No. 8.84.1(k), as given in this case, the instruction on its face no more violates

Lockett than does the language of Penal Code section 190.3, subdivision (k) itself.

The jury in this case could not reasonably have understood factor (k) other than as construed by the California Supreme Court in People v. Brown, supra, 40 Cal.3d at p. 541, and as previously understood by this Court.

Factor (k) told the jury to consider "any" other possible circumstance in mitigation which "extenuates" the "gravity" of the crime, even circumstances that did not constitute any kind of "legal excuse" for the crime. "Extenuate" was defined as meaning "to lessen the seriousness" of the crime, "as by giving an excuse." (RT 4833; J.A. 34.)[10/]

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10. The standard "unadorned" factor (k) portion of the instruction was supplemented in this case by the definition of the word "extenuate." Counsel for petitioner specifically "agreed" to the definition of the word "extenuate" given by the court, and told

Circumstances which did not constitute any kind of "legal excuse" could only be reasonably understood by the jurors as involving a non-legal circumstance which mitigated or "extenuate[d]" the "gravity" of the crime and thereby provided a basis for the lesser sentence. The jury was told earlier in the instruction that, having determined all the legal issues, its only remaining function was to determine the penalty, either death or life without parole. (RT 4831; J.A. 33.) The jury would, therefore, reasonably have understood the "gravity" of the crime to refer to the appropriate penalty to be imposed.

The evidence presented by petitioner at the penalty phase was precisely evidence which did not

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the jury it was on that basis that he would be arguing the case. (RT 4789, J.A. 26.)

constitute any kind of "legal excuse" for the crime, but which might nevertheless appeal to the jurors' moral judgment in assessing the "seriousness" or "gravity" of the offense, that is, in determining whether life without parole or death was the appropriate penalty in petitioner's case. The jury would reasonably have understood factor (k) as a "catchall" factor, just as it has been construed by the California Supreme Court, not limited to "legal" excuses, under which it was to consider "<u>any</u> other" mitigating factors, including petitioner's background and character that, in the exercise of its moral judgment, might point toward a life sentence rather than death.

This conclusion is strongly supported by a consideration of factor (k) in context. The jury was first told in CALJIC No. 8.84.1 that in determining penalty it was to consider "all of the

evidence which has been received during any part of the trial of this case." (RT 4831; J.A. 33.) Over the course of four days petitioner presented eight witnesses (six family members and two psychologists), whose testimony consumes over two volumes of evidence in his behalf at the penalty phase. (RT 4301-4746.) The jury could not have been faithful to the court's instruction that it consider "all of the evidence" before it in determining the penalty, and at the same time have ignored the mass of evidence presented by petitioner at the penalty phase, all of which consisted of background and character evidence.

Moreover, the jurors could not reasonably have believed that factor (k) was limited to the circumstances of the crime, because other factors clearly involved the background and character of the defendant. Factor (c) was "the

presence or absence of any prior felony conviction." This factor could only have been understood by the jurors as relating to the background and character of the defendant, not to the circumstances of the offense. Likewise, factor (b) related solely to petitioner's use or attempted use of force or violence on prior occasions, and hence to his background and character. The California Supreme Court has held that factors (b) and (c) pertain only to criminal acts other than those for which the defendant was convicted in the present proceeding. (People v. Miranda (1987) 44 Cal.3d 57, 105-106, fn. 28, cert. den., 100 L.Ed.2d 613 (1988); People v. Kimble (1988) 44 Cal.3d 480, 505; People v. Melton (1988) 44 Cal.3d 713, 763, cert. den., 102 L.Ed.2d 346 (1988); People v. Malone (1988) 47 Cal.3d 1, 45-46, mod. 47 Cal.3d 745a, cert. den., 104 L.Ed.2d 998 (1989).)

In addition, factors (d) and (h) would typically involve matters extrinsic to and occurring over a period of time prior to the current offense. A defendant might have a long history of mental illness, prior instances of delusional conduct or past hospitalizations. These would be matters in the defendant's background, admissible under factors (d) and (h).[11/] Similarly, factor (f) could, in any given case, involve the defendant's background.

Thus, the jury would have known that it was free to consider petitioner's background and character evidence in determining the appropriate penalty.

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11. Petitioner offered no such evidence. Reasonable jurors would, however, understand from the very language of such factors that they were not limited in their consideration of factors in mitigation to circumstances attendant to the crime, but could consider matters in petitioner's background.

That certain of the factors are phrased in terms of "whether or not the offense was committed" under certain circumstances does not support petitioner's conclusion. Certain factors are only relevant to the extent that they bear upon the commission of the offense. For example, if the defendant offered evidence that he was intoxicated six months before the crime, with no evidence to suggest that he was a chronic alcoholic or that he was intoxicated at the time of the commission of the offense [factor (h)], such evidence would not be relevant under factor (h) or under Lockett. Lockett expands but does not eliminate the requirement of relevancy for purposes of determining penalty. (Lockett v. Ohio, supra, 438 U.S. at p. 604, fn. 12.)

But the jury would have no reason to think it was precluded from considering petitioner's background and

character evidence under factor (k). Indeed, factors (b) and (c) are not related to the circumstances of the crime, and are simply relevant because they bear upon the background and character of the person who committed the crime for which the jury is determining the penalty. Factor (k) would reasonably be understood by the jury as permitting it to consider any mitigating background and character evidence.

Petitioner's contention ignores the fact that all of the prosecution's evidence at the penalty phase likewise consisted of evidence relating solely and exclusively to petitioner's background and character. None of it related to the circumstances of the charged offenses. The prior assault on Colleen Dietzman (RT 4025-4027, 4034-4037), the brick attack on Mrs. Mary Matlock (RT 4042-4045) the string of prior robberies committed by

petitioner (Katherine Hagen--RT 4126-4129); Mark Page--RT 4132-4138; Timothy Hanks--RT 4140-4145; Charles Skalf--RT 4148-4158; Edward Wall--RT 4163-4173), petitioner's failure to make any effort to rehabilitate himself or engage in any kind of productive conduct when he was formerly on parole (RT 4061-4068), and petitioner's escape plan, which involved the killing of a jail guard if necessary (RT 4190-4217, 4269-4289), was all evidence presented by the prosecution concerning petitioner's background and character.

The jury could not have reasonably believed it must ignore petitioner's background and character evidence, while giving weight to the prosecution's background and character evidence.[12/]

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12. Petitioner argues that a broad description of the evidence to be considered "cannot cure a specific directive to consider that evidence only in relation to certain issues," citing

Lockett v. Ohio, supra, 438 U.S. at p. 608. (Petitioner's Brief, at p. 23.) But factor (k) is not limited to "certain issues." It is an obvious "catchall" provision which authorizes the jury to consider "any" other circumstances in mitigation shown by the evidence, unlike the Ohio statute, which limited the jury to three specific circumstances, contained no catchall provision analogous to factor (k), and did not provide for the kind of weighing of aggravating and mitigating circumstances that is the heart of the California procedure.

For the same reason, petitioner's argument that the instruction to consider "all" the evidence introduced during any part of the trial (RT 4831; J.A. 33) would be seen by the jurors as being in "conflict" with factor (k) (Cabana v. Bullock (1986) 474 U.S. 376, 383, fn. 2; Francis v. Franklin (1985) 471 U.S. 307, 322) is simply wrong. Jurors would naturally assume that the instructions were consistent with each other, and would reasonably conclude that they were to consider "all" the evidence (RT 4831; J.A. 33) in determining whether there were "any" other circumstances in mitigation (RT 4833; J.A. 34).

Indeed, if the jurors had the slightest doubt about that matter, they could easily have asked the court for clarification. Likewise, defense counsel could have objected to the instructions and requested a ruling from the court. The purported inconsistency in the instructions was clearly "not apparent to one on the spot." (Cf. Lowenfield v. Phelps (1988) 484 U.S.

Nor was an "antisympathy instruction" (see California v. Brown, supra, 479 U.S. 538) given at the penalty phase, which further supports the conclusion that the jury would have considered petitioner's evidence. (RT 4831-4836.)

Petitioner argues that the jury could not have understood the instruction to consider "all" the evidence as including mitigating factors not specified among the listed mitigating factors without the jury simultaneously improperly construing the same instruction as permitting it to consider aggravating factors outside the list of statutory aggravating circumstances, contrary to the holding of the California Supreme Court in People v. Boyd (1985) 38 Cal.3d 762, 772-775, that non-statutory aggravating circumstances cannot be considered.

___, 98 L.Ed.2d 568, 579.)

But factor (k) is expressly limited to mitigating circumstances, i.e., any other circumstance which "extenuates" the gravity of the crime, and the jury would have no reason to look for non-statutory aggravating factors, since there was no prosecution evidence which was not properly considered under the statutory aggravating factors (a), (b) and (c). Moreover, even if the jury somehow were to make such an assumption, there would at most be state law error, not error of federal constitutional dimension. (Barclay v. Florida (1983) 463 U.S. 939; Harris v. Pulley (9th Cir. 1982) 692 F.2d 1189, 1194 (rev'd on other grounds, Pulley v. Harris, supra, 465 U.S. 37).)

The arguments of counsel, which the jury was told to consider (RT 4836; J.A. 35), made it clear to the jury that petitioner's evidence was to be weighed. Petitioner's counsel forcefully argued to

the jury at length that the evidence presented by petitioner at the penalty phase was relevant under what he referred to as the "catchall" factor (k), and that factor (k) could, in the jury's discretion, outweigh all the factors in aggravation, and warrant a sentence of life without parole. (RT 4785-4790, 4828-4831; J.A. 25-27, J.A. 31-33.) He concluded his argument by telling the jurors,

> "So, we are not asking you, we are not asking you to step outside those factors, we are asking you to step inside them fully and completely. Can K outweigh A through J? If you find that it does, it does, and that is your choice. That is what we are asking you to do." (RT 4830, J.A. 32-33.)

The prosecutor never suggested that the jury could not consider, as a matter of law, any of petitioner's evidence in mitigation. He argued simply that petitioner had always attempted to blame everyone else for his own failures,

and that the jury should reject, on its merits, the argument of petitioner's counsel that the failures of his "probation officers, parole officers, family" "should mitigate this particular crime." (RT 4823-4824; J.A. 28-29; emphasis added.) The prosecutor argued not that the jury could not legally give any weight to that argument, but that the jury "should" give little or no weight to that argument, in the exercise of its discretion and moral judgment, because petitioner had used that argument too many times and it was up to the jury to say "no more." (RT 4824; J.A. 29.)

The prosecutor argued that, "Nothing I have heard lessens the seriousness of this crime, nothing." (RT 4824; J.A. 29; emphasis added.) This was a statement of the prosecutor's personal opinion based on the evidence, not a

statement of law which precluded the jury from concluding otherwise.

At another point the prosecutor similarly argued to the jury that it was being asked to consider whether what "it" had heard "about this Defendant" extenuated the gravity of the crime "and I would suggest it does not." (RT 4776-4777; J.A. 23.) The prosecutor thus acknowledged the background evidence offered by petitioner, stated it was up to the jury to decide whether it extenuated the gravity of the crime and urged the jury to agree with his evaluation that it should not. But the prosecutor never suggested that the jury was legally precluded from reaching a different conclusion.

The prosecutor told the jury the weighing process was "not a process of counting, it's not 10 to 1, it is a process of weighing," and if the jury

found that "one factor mitigates" (which could only have been factor (k), since petitioner offered no evidence under any other factor), the jury "should decide whether or not that one factor in mitigation outweighs all those factors in aggravation and then decide the case." (RT 4825, J.A. 30.)

The jury heard the views of two advocates on how much weight should be given to the evidence presented by petitioner. What it never heard was anything from either the prosecutor or defense counsel that it was precluded by law from giving any weight to any of the evidence offered by petitioner in mitigation. The jury heard exactly the opposite. (People v. Boyde, supra, 46 Cal.3d at p. 251.)

Petitioner alludes to references in the sequestered, individual voir dire examination of certain prospective jurors,

wherein the prosecutor stated that the California procedure as it then existed was "a very strict structure" which involved the jury taking the evidence and "plug[ging] it into the factors" upon which the jury would be instructed. (RT 1158-1159, 1976; J.A. 9, 17.)

Voir dire examination is simply too far removed, both temporally and conceptually, from the formal instruction of the jury on the law by the court at the conclusion of the case to serve as a valid indicium of whether the jury misunderstood the court's penalty phase instructions. (Darden v. Wainwright (1986) 477 U.S. 168, 183, fn. 15.) In Darden, the Court rejected the proposition that comments made by the prosecutor at the "guilt-innocence stage of trial" could provide a basis under Caldwell v. Mississippi (1985) 472 U.S. 320, for overturning the penalty decision. (See also People v. Boyde,

supra, 46 Cal.3d at 254.) Petitioner cites only Mann v. Dugger (11th Cir. 1987) 817 F.2d 1471, 1483, cert. den., ___ U.S. ___, 103 L.Ed.2d 821 (1989), which is inconsistent with the Court's conclusion in Darden.

The prosecutor's statements here were even further removed from the penalty phase than in Darden. They occurred before the jurors were even sworn to try the guilt phase of the trial. The jury was instructed at the guilt phase that the arguments of counsel were not evidence. (RT 3933.) The first time the jury was told it could consider the statements of counsel for any purpose was at the penalty phase. (RT 4836, J.A. 35.) The court never approved the statements of either counsel during voir dire examination as necessarily precise and accurate statements of the law.

The voir dire examination of Mr. Armas occurred on January 26, 1982, while the examination of Ms. Ash occurred on February 8, 1982. (RT 1142, 1949, et seq.) The jury was instructed at the penalty phase on March 29, 1982, approximately two months later, and after it had been instructed under different instructions applicable at the guilt phase, had deliberated, had returned guilt phase verdicts, and had heard extensive penalty phase evidence. (CT 529.) It is unreasonable to assume that the jurors remembered statements of counsel during voir dire examination, and further that they were contemplating them in conjunction with the penalty phase instructions delivered by the court two months later.

Moreover, the purpose of voir dire examination under California law is to determine possible bias or prejudice of

prospective jurors, not "'to indoctrinate the jury, or to instruct the jury in matters of law.'" (People v. Crowe (1973) 8 Cal.3d 815, 824.)[13]

There is a substantial difference between considering the arguments of counsel in determining whether the jury was misled (California v. Brown, supra, 479 U.S. at 546 (O'Connor, J., conc.)), and considering statements of counsel during voir dire examination of jurors. Arguments of counsel are addressed to the instructions which immediately follow by the court, and are fresh in the jury's mind. Voir dire examination is simply an effort to explore

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13. The California Supreme Court has somewhat broadened the scope of voir dire examination (People v. Williams (1981) 29 Cal.3d 392, 402-412), but it is still the rule that the purpose of voir dire examination is not to "indoctrinate the jury" on the law. (People v. Melton (1988) 44 Cal.3d 713, 750, fn. 14, cert. den. 102 L.Ed.2d 346 (1988).)

generally the attitudes of potential jurors who are not yet even sworn to try the case.

In any event, petitioner takes the prosecutor's statements out of context and misconstrues them. The prosecutor prefaced his remarks to Mr. Armas concerning the "strict structure" of the law with his statement that ". . . we can't have a lot of people up here as jurors, sitting there and now debating whether they like the law or not like the law," that the jurors were not "writing on a blank slate or writing the law yourself," and that the jurors must apply the law as given. (RT 1158; J.A. 9; emphasis added.) The thrust of the prosecutor's inquiry was his question whether Mr. Armas would be able to "go along with the law," rather than "substitute your personal ideas" as to what the law should be. (RT 1159; J.A. 9-

10.) The prosecutor also told Mr. Armas that the goal of the law was "to insure a rational reasoned decision as best we can do this question," as opposed to untethered "sympathy and emotion" which "rises and falls" without rhyme or reason. (RT 1160; J.A. 1160.)

The prosecutor similarly told Ms. Ash that under the former laws jurors could decide on the penalty "with no guidelines at all," which could result in different verdicts depending on whether it was "Monday" or "Tuesday," which the courts decided was "too unpredictable and unfair." (RT 1976; J.A. 17.)

It was in this context that the prosecutor stated that the law had created "about nine or ten factors" and the jury "essentially" took the evidence and "plug[ged] it into the factors," as a result of which the process was "not so

much" a matter of the juror's personal opinion. (RT 1976-1977; J.A. 17.)

The thrust of the prosecutor's voir dire examination was consistent with the Court's requirement that jury discretion must be channeled in order to provide reasoned decisions rather than capricious or purely emotional ones. (California v. Brown, supra, 479 U.S. 538, 542-543; Gregg v. Georgia, supra, 428 U.S. 153, 188-189; Zant v. Stephens (1983) 462 U.S. 862, 874; Franklin v. Lynaugh (1988) 487 U.S. ___, 101 L.Ed.2d 155, 170-171; Gardner v. Florida (1977) 430 U.S. 349, 358; Furman v. Georgia (1972) 408 U.S. 238.)

Taken in context, and given the limited purposes of voir dire examination, the California Supreme Court correctly concluded that the comments during voir dire were proper since the prosecutor was "contrasting the current death penalty law

with the former one" held unconstitutional in Furman for lack of standards "governing the jury's exercise of discretion in sentencing," and he was attempting to explain that current law did not leave jurors "rudderless" but provided "concrete standards to guide the jury's exercise of discretion." (People v. Boyde, supra, 46 Cal.3d at 254, fn. 6.)

Petitioner and amicus California Appellate Project cite excerpts from the trial records in particular California capital cases in which jurors were assertedly misled concerning the scope of the unadorned factor (k).[14/] A similar

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14. Petitioner and amicus neglect to cite the resulting California Supreme Court opinions.

In two of the cases cited by petitioner, the California Supreme Court reversed the penalty, based in whole or in part on the jury having been misled by the arguments of counsel, concerning the scope of factor (k). (People v. Davenport (1985) 41 Cal.3d 247; People v. Edelbacher (1989) 47 Cal.3d 983.) In People v. Lucero (1988) 44 Cal.3d 1006, the penalty was reversed for exclusion

attempt was implicitly rejected by the majority in California v. Brown, supra (see dissenting opinion of Brennan, J.,

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of mitigating evidence. The California Supreme Court reversed the judgment in its entirety in People v. Bigelow (1984) 37 Cal.3d 731. The California Supreme Court granted a writ of habeas corpus in In re Sixto (1989) 48 Cal.3d 1247, on the ground of ineffective assistance of counsel, before even hearing the appeal. Thus, the California Supreme Court took corrective action in each case where it was required.

In People v. Guzman (1988) 45 Cal.3d 915, 956-958, cert. den. ___ U.S. ___, 102 L.Ed.2d 1005 (1989); People v. McDowell (1988) 46 Cal.3d 551, 577-579, cert. den., ___ U.S. ___, 104 L.Ed.2d 441 (1989); and People v. Keenan (1988) 46 Cal.3d 478, 514-515, cert. den., ___ U.S. ___, 104 L.Ed.2d 169, the California Supreme Court held in each case that under all the circumstances the jury had not been misled.

The result in each case was based upon the particular circumstances of that case. These cases do not support the proposition that petitioner's jury misunderstood the scope of its function.

The California Supreme Court has yet to rule in People v. Payton, Cal.Sup.Ct.No. S004437 and People v. Hitchings, Cal.Sup.Ct.No. S004524.

479 U.S. at pp. 553-558).[15] The issue before the Court is what the jury in petitioner's case reasonably would have understood, based upon the language of the instructions as a whole, the nature of the evidence before the jury, and what petitioner's jury, not some other jury, was told by counsel in argument. Whether the jury was misled by what occurred in some other case cannot demonstrate that petitioner's jury misunderstood its ability to consider the mitigating evidence before it.

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15. The danger in relying on representations of counsel concerning what is contained in selected isolated statements from records not before the Court is demonstrated by the reference in Justice Brennan's dissenting opinion in California v. Brown, supra, to the trial record in this very case as illustrative of the gloss that consistently has been placed on "the antisympathy instruction." (California v. Brown, supra, 479 U.S. at p. 554 (Brennan, J., dissenting, citing People v. Boyde, CR 22584).)

An "antisympathy instruction" was not given in the penalty phase of the instant case. (RT 4831-4836.)

While "strained in the abstract," petitioner's contention "is simply untenable when viewed in light of the surrounding circumstances." (California v. Brown, supra, 479 U.S. at p. 542.) Petitioner's interpretation of the challenged instruction would ignore the "catchall" nature of factor (k), the instruction to consider "all the evidence" before the jury, the fact that other factors involved petitioner's background and character, the reality that the prosecution's evidence likewise consisted entirely of background and character evidence, and the arguments of counsel which were premised on the jury's consideration of all the evidence. In short, petitioner's contention would transform a seven day penalty phase trial (including four days of testimony by petitioner's eight witnesses, consuming over two volumes of Reporter's Transcripts

-- RT 4301-4746) into a "virtual charade." (California v. Brown, supra, 479 U.S. at p. 542.) Such an interpretation is manifestly unreasonable and would be rejected by reasonable jurors. (Ibid.)

Petitioner's jury simply could not have been confused about the intent and effect of factor (k). Reasonable jurors could only have understood that they were to consider all the evidence before them, and that factor (k) meant that if there were any other mitigating factors in the evidence, which did not come within one of the other factors on which they had been instructed, they were free to be considered, and indeed were required to be considered, under the "catchall" factor (k).

Unlike the situation in Lockett, in California the jury can consider under the "catchall" factor (k) any mitigating evidence which does not come within one of

the other specific factors. (California v. Ramos, supra, 463 U.S. at p. 1005, fn. 19.)

Petitioner's reliance on Penry v. Lynaugh, supra, ___ U.S. ___, 57 U.S.L.W. 4958, is misplaced. In Penry, similar to Lockett, the jury was circumscribed by three special issues under state law in its consideration of any evidence in mitigation, unlike California's procedure which provides for jury weighing of an extensive list of aggravating and mitigating circumstances, together with the mitigating "catchall" factor (k). Texas conceded that Penry's evidence of mental retardation could not be given independent mitigating weight within the three statutory questions. (Penry v. Lynaugh, supra, ___ U.S. at ___, 57 U.S.L.W. at 4964.) Indeed, it was likely to have been viewed not as mitigating but as aggravating under the

second special issue. (Penry v. Lynaugh, supra, ___ U.S. at ___, 57 U.S.L.W. at 4963.)

Here, the jury was free to give independent mitigating weight to petitioner's evidence under the "catchall" factor (k), something that was completely lacking in both Lockett and Penry. Moreover, unlike Penry, counsel for petitioner here specifically "agreed" to the definition of the word "extenuate" given by the court, and told the jury it was on that basis that he would be arguing the case. (RT 4789, J.A. 26.) Nor did the prosecutor exploit the instructions to petitioner's disadvantage. (See Penry v. Lynaugh, supra, ___ U.S. at ___, 57 U.S.L.W. at pp. 4960-4964.)

CALJIC No. 8.84.1 allowed the jury to treat petitioner as an individual. (See, Lockett v. Ohio, supra, 438 U.S. at p. 605.) It did not prevent the jury from

considering any relevant, mitigating evidence in the case. (See, Franklin v. Lynaugh, supra, 487 U.S. ___, 101 L.Ed.2d at p. 160.) Thus, there was no risk that the death penalty would be imposed in spite of the existence of factors calling for a less severe penalty. The jury was fully able to express its "reasoned moral response"-to all the evidence before it. (Penry v. Lynaugh, supra, ___ U.S. at ___, 57 U.S.L.W. at p. 4965.)

II

INSTRUCTING THE JURY, IN ACCORDANCE WITH CALIFORNIA PENAL CODE SECTION 190.3, THAT IT "SHALL" DECIDE THE APPROPRIATE PENALTY, DEATH OR LIFE WITHOUT PAROLE, BY WEIGHING AGGRAVATING CIRCUMSTANCES AGAINST MITIGATING CIRCUMSTANCES IS CONSTITUTIONALLY PERMISSIBLE

California law requires a "weighing" of aggravating and mitigating circumstances by the jury in order to determine the appropriate penalty, death or life without possibility of parole. The trier of fact "shall" impose a sentence of death if the trier of fact concludes that "the aggravating circumstances outweigh the mitigation circumstances" and likewise "shall" impose a sentence of life in prison without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Cal. Pen. Code, §

190.3.)[16/] California law is evenly

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16. Of the 37 states with death penalty laws, 14 (including California) require the death sentence where aggravating factors outweigh mitigating factors, or where aggravating factors or their equivalent are unmitigated. (Ariz. Rev. Stat. Ann., § 13-703; Cal. Pen. Code, § 190.3; Conn. Gen. Stat., § 53a-46a; Idaho Code, § 19-2515; Ill. Rev. Stat., ch. 38, Para. 9-1; Md. Ann. Code, Art. 27, § 413; Mont. Code Ann., § 46-18-305; N.J. Rev. Stat., § 2C:11-3; Ohio Rev. Stat. Ann., § 2929.03; Or. Rev. Stat., § 163.150; 42 Pa. Cons. Stat., § 9711; Tenn. Code Ann., § 39-2-203; Tex. Code Crim. Proc. Ann., Art. 37.071; Wash. Rev. Code Ann., § 10.95.080.)

The courts which have reviewed these statutes have, with one exception, rejected the contention that such statutes constitute invalid mandatory death penalty statutes, since any mitigating circumstance may preclude a capital sentence. (See State v. Roscoe (1984) 145 Ariz. 212, 700 P.2d 1312, cert. den., 471 U.S. 1094 (1985); State v. Gillies (1984) 142 Ariz. 564, 691 P.2d 655, cert. den., 470 U.S. 1059 (1985); State v. Jordan (1983) 137 Ariz. 504, 672 P.2d 169 (1983); see Adamson v. Ricketts (9th Cir. 1985) 758 F.2d 441, reh. en banc, rev'd on other grounds, (9th Cir. 1986) 789 F.2d 722, rev'd, 483 U.S. 1 (1987); contra Adamson v. Ricketts (9th Cir. en banc 1988) 865 F.2d 1011, cert. pending; People v. Hamilton (1988) 46 Cal.3d 123, cert. den., 103 L.Ed.2d 238 (1989); People v. Brown, supra, rev'd on other grounds, California v. Brown, supra, 479 U.S.

balanced.

The jury in this case was instructed in the language of California Penal Code section 190.3 that it was to determine the appropriate penalty by weighing the factors in aggravation against the factors in mitigation. (RT 4836; J.A. 35.)

538; People v. Albanese (1984) 104 Ill.2d 504, 473 N.E.2d 1246, cert. den., 471 U.S. 1044 (1985); People v. Jones (1982) 94 Ill.2d 275, 447 N.E.2d 161, cert. den., 464 U.S. 920 (1983); Foster v. State (1985) 304 Md. 439, 499 A.2d 1236, cert. den., 478 U.S. 1010 (1986); State v. Coleman (1979) 185 Mont. 299, 605 P.2d 1000, cert. den., 446 U.S. 970 (1980); State v. Price (N.J.Super. 1984) 478 A.2d 1249; State v. Jenkins (1984) 15 Ohio St.3d 164, 473 N.E.2d 264, cert. den., 472 U.S. 1032 (1985); Commonwealth v. Peterkin (1986) 511 Pa. 299, 513 A.2d 373, cert. den., 479 U.S. 1070 (1987); State v. Bell (Tenn. 1988) 745 S.W.2d 858, cert. den., 103 L.Ed.2d 862; Houston v. State (Tenn. 1979) 593 S.W.2d 267, cert. den., 449 U.S. 891 (1980); Johnson v. State (Tex.Crim.App. 1984) 691 S.W.2d 619, cert. den., 474 U.S. 865 (1985); Campbell v. Kincheloe (9th Cir. 1987) 829 F.2d 1453, cert. den., 102 L.Ed.2d 369.)

The Court has established "two separate prerequisites to a valid death sentence. First, sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. . . . Second, even though the sentencer's discretion must be restricted, the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his `"character or record and any of the circumstances of the offense."'" (California v. Brown, supra, 479 U.S. at 541.) These two requirements arguably "are somewhat in `tension' with each other." (Franklin v. Lynaugh, supra, 487 U.S. ___, 101 L.Ed.2d 155, 171, citing California v. Brown, supra, 479 U.S. at p. 544 (O'Connor, J., conc.).)

California's law is not unconstitutional because it provides that the jury "shall" determine penalty by

application of the weighing process. The Court upheld use of a mandatory weighing process in Proffitt v. Florida (1976) 428 U.S. 242. Florida interpreted its statute as compelling a death judgment in the absence of mitigating circumstances. (Barclay v. Florida, supra, 463 U.S. 939, 961-962, citing Cooper v. State (1976) 336 So.2d 1133, 1142 (Stevens, J. conc.); see also Woodson v. North Carolina (1976) 428 U.S. 280, 315 (Rehnquist, J. dis.); Roberts v. Louisiana (1976) 428 U.S. 325, 362, fn. 8 (White, J. dis.).) When this Court again approved Florida's statute in Barclay v. Florida, supra, that state still interpreted its statute as establishing a rebuttable "presumption" of death. (Barclay v. Florida, supra, 463 U.S. at pp. 961-962, citing Williams v. State (1980) 386 So.2d 538, 543 (Stevens, J. conc.).)

Ironically, the Court in Proffitt rejected the argument made by petitioner that the Florida weighing process was unconstitutional because it gave the trier of fact too much discretion. (Proffitt v. Florida, supra, 428 U.S. at pp. 254, 257.) In a concurring opinion, Justice White, joined by the Chief Justice and Justice Rehnquist, noted that Florida law required the trier of fact to impose the death penalty on all first-degree murderers where the statutory aggravating factors outweighed the mitigating factors, a provision which assured that the death penalty would not be imposed "freakishly or rarely," in violation of Furman. (Id., at pp. 260-261 (White, J., conc.).)

The Texas procedure upheld in Jurek similarly required the jury to return a death sentence if it affirmatively answered all three statutory

questions, and likewise required the jury to return a life sentence if the answer to any question was no. (Jurek v. Texas (1976) 428 U.S. 262, 269.) The concurrence in Jurek noted that the sentencer "must" impose the death penalty if it answered the questions affirmatively and that the statute did "not extend to juries discretionary power to dispense mercy. . . ." (Id. at p. 279 (White, J. conc.); see also Woodson v. North Carolina, supra, 428 U.S. at p. 315 (Rehnquist, J. dis.); Roberts v. Louisiana, supra, 428 U.S. at p. 359 (White, J. dis.); see Lowenfield v. Phelps (1988) 484 U.S. ___, 98 L.Ed.2d 568, 582 (noting that the Texas statute upheld in Jurek "required" the jury to impose death so long as it answered affirmatively the three statutory questions).)

The Court approved the statute in Jurek because it narrowed the class of

death-penalty eligible murderers and because it permitted the sentencer to consider all mitigating circumstances. (Jurek v. Texas, supra, 428 U.S. at pp. 270-276 (Stewart, J. plur.).) Franklin v. Lynaugh, supra, reaffirmed the constitutionality of Texas' death penalty scheme on the assumption that the statute permitted consideration of all mitigating evidence. (Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at 169-171 (White, J. plur.), 172 (O'Connor, J. conc.).)[17/]

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17. Penry v. Lynaugh, supra, ___ U.S. ___, 57 U.S.L.W. 4958, implicitly reaffirmed the constitutionality of the requirement that Texas juries determine penalty solely by its answers to the three Texas special issues.

Since a jury under Texas law is required to return the penalty determined by its answers to the three Texas special issues, where particular mitigating evidence does not readily fit within the three special issues, a defendant may be entitled to instructions ensuring jury consideration of all relevant mitigating evidence under Texas law. (Id.) Penry cannot be extended to other states, including

The Court upheld California's 1977 and 1978 death penalty statutes in Pulley v. Harris, supra, 465 U.S. 37, 53, and California v. Ramos, supra, 463 U.S. 992, 1005-1006, and fn. 19, because the class of death eligible defendants was narrowed, while the statutory list of relevant factors suitably directed and limited jury discretion, while permitting consideration of any relevant mitigating evidence.[18/] This conclusion was

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California, which already permit full consideration of all relevant mitigating evidence.

18. Petitioner was tried under the 1978 law. Although technically the Court upheld the 1977 statute in Pulley v. Harris, supra, and the 1978 statute in Ramos, there is no significant difference between the two statutes in terms of jury sentencing discretion. The California Supreme Court has construed the 1978 statute such that it "does not operate less favorably to [defendants] than the 1977 version" (People v. Murtishaw (1989) 48 Cal.3d 1001, 1025), and has repudiated the suggestion "that the two laws offer substantially disparate sentencing discretion." (People v. Murtishaw, supra, 48 Cal.3d at p. 1029.)

reaffirmed by the Court in California v. Brown, supra, 479 U.S. 538, 540 (fn. *).

Indeed, in California v. Brown, supra, 479 U.S. 538, in which the jury likewise received the unadorned factor (k) instruction and the same "shall" instruction, this Court characterized the instructions as a whole as telling the jury "to consider the aggravating and mitigating circumstances and to weigh them in determining the appropriate penalty." (Id., at p. 540; emphasis added.) The words "appropriate penalty" were this Court's characterization of the import of the instructions, since the words "appropriate penalty" no more appeared in the actual words of the instructions given in Brown than here.

California's procedure properly restricts and channels jury discretion, which can serve the "useful purpose" of precluding consideration of extraneous

emotional factors unrelated to the evidence. (See California v. Brown, supra, 479 U.S. at p. 543.) It also provides a specific procedure (weighing aggravation against mitigation), which ensures that the death penalty will be imposed "with regularity," rather than "freakishly or rarely." (Proffitt v. Florida, supra, 428 U.S. 242, 260 (White, J. conc.); Jurek v. Texas, supra, 428 U.S. at pp. 278-279 (White, J. conc.).)

California's procedure serves to "minimize the risk of wholly arbitrary and capricious action." (Gregg v. Georgia, supra, 428 U.S. 153, 188-189; see also Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at 170-171; Zant v. Stephens, supra, 462 U.S. 862, 874.) "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice

or emotion." (Gardner v. Florida, supra, 430 U.S. 349, 358.) "[T]his court has gone to extraordinary measures to insure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." (Caldwell v. Mississippi, supra, 472 U.S. 320, 329, fn. 2, & 349 (Rehnquist, J., dissenting).)

California's procedure also promotes the rational and predictable administration of death penalty laws. (California v. Brown, supra, 479 U.S. at p. 541.) By requiring the jury to return a sentence consistent with its application of the weighing process, California law provides a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." (Furman v.

Georgia, supra, 408 U.S. at 238 (White, J. conc.).) It also fosters reliability and furthers judicial review. (California v. Brown, supra, 479 U.S. at p. 543.)

At the same time, California's procedure permits the jury to consider any mitigating evidence which a defendant may offer, thereby permitting the jury to express its "reasoned moral response" to all the evidence before it. (Penry v. Lynaugh, supra, ___ U.S. at ___, 57 U.S.L.W. at 4965 (plur. opn.); see Argument I, supra.)

Petitioner argues that the Constitution mandates that the jury make two separate determinations: aggravation outweighs mitigation and a separate and independent determination that death is the "appropriate" penalty.

Petitioner's argument assumes that in performing the statutorily prescribed weighing process the jury

simply mechanically weighs factors, devoid of any "individualized assessment of the appropriateness of the death penalty" required by the Eighth and Fourteenth Amendments. (Penry v. Lynaugh, supra, ___ U.S. at ___, 57 U.S.L.W. at p. 4692.)

Petitioner's argument is premised on an erroneous construction of California law. The California Supreme Court has specifically rejected petitioner's "mechanical" analysis of California's weighing process, and has held that each juror "is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor 'k' as we have interpreted it." (People v. Brown, supra, 40 Cal.3d at p. 541.) By weighing the various factors, the jury "simply determines under the relevant evidence which penalty is appropriate in the

particular case." (People v. Brown, supra, 40 Cal.3d at p. 541, fn. omitted; see also People v. Allen (1986) 42 Cal.3d 1222, 1277, cert. den., 101 L.Ed.2d 977 (1988); People v. Hendricks (1988) 44 Cal.3d 635, 650-651, cert. den., 102 L.Ed.2d 236 (1988).)

In the instant case, the majority of the California Supreme Court explicitly rejected the notion that the jury must go through "two separate assessments" under California law in order to exercise its moral judgment as to the "appropriate" penalty. Instead, the jury "makes its appropriateness determination during its normative weighing process." (People v. Boyde, supra, 46 Cal.3d at p. 254.)

Petitioner's contention is not only based on an erroneous understanding of California's weighing process, but it finds no support in any decision of this

Court. Petitioner argues that the Court has repeatedly recognized that "the constitutional bottom line" is whether death is "the appropriate" sentence under all of the evidence, and that the sentence should reflect a "reasoned moral response to the defendant's background, character, and crime," citing Penry v. Lynaugh, supra, ___ U.S. at ___, 57 U.S.L.W. at 4962, and Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at 172 (conc. opn.), quoting California v. Brown, supra, 479 U.S. at p. 545 (O'Connor, J., conc.). (Petitioner's Brief, p. 25.)

The Court has never held that the jury is constitutionally required to make a separate determination of "appropriateness" apart from the state's statutorily prescribed process, which is petitioner's argument. To the contrary, under both the Texas procedure upheld by the Court in Jurek and the Florida

procedure upheld in Proffitt, the appropriateness of the penalty was determined solely as part of the statutorily mandated process, and was not a separate determination. (See Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at p. 169, (petitioner's contention that the jury should have been instructed that, even if its answers to the Texas special questions were "Yes," it was still entitled to cast an "independent" vote against the death penalty was "foreclosed by Jurek . . . .").)

Moreover, as the plurality noted in Franklin v. Lynaugh, supra, 487 U.S. at ___ (n. 12), 101 L.Ed.2d at 171 (n. 12), a capital jury deliberating at the penalty phase whether the circumstances in aggravation outweigh those in mitigation "is aware of the consequences of its answers. . . ." The jury here obviously

knew that by giving greater weight to the evidence in mitigation it could return a sentence of life without parole. The prosecutor recognized this possibility in his argument. (RT 4825; J.A. 30.)[19]

Moreover, under factor (a) the jury is free to consider any mitigating circumstances inherent in the crime itself or in the special circumstances, since factor (a) is not labeled as either aggravating or mitigating. Thus, in deciding the relative weight of this factor, the jury will automatically decide the sufficiency of the aggravation.

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19. At the Penal Code section 190.4, subdivision (e) hearing on the motion for modification of penalty, defense counsel praised the jury for having carefully considered all the evidence before it, noting that the jury "took the night off to see if it really set with them" before returning their death penalty verdict, which counsel characterized as "a singularly human" and "very good thing for them to do under the circumstances." (RT 4883.)

Petitioner's argument is an unwarranted extension of this Court's jurisprudence. Giving a jury absolute discretion to determine penalty once the class of death penalty eligible defendants has been constitutionally narrowed is constitutionally tolerable (Gregg v. Georgia, supra, 428 U.S. 153; Zant v. Stephens, supra, 462 U.S. 862), but the Court has never held that it is constitutionally mandated. (Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at p. 170.)

Petitioner's argument would engraft a third requirement of "unbridled discretion" for sentencers. To do so would improperly intrude into California's procedure for channeling and guiding sentencer discretion that is part of California's "effort to achieve a more rational and equitable administration of the death penalty." (Franklin v. Lynaugh,

supra, 487 U.S. ___, 101 L.Ed.2d 155, 170.)

As recently as 1988, the Court held that the Constitution "requires no more" than that death penalty statutes "narrow[ ] the class of death-eligible murderers and then at the sentencing phase allow[ ] for the consideration of mitigating circumstances and the exercise of discretion." (Lowenfield v. Phelps, supra, 484 U.S. ___, 98 L.Ed.2d 568, 583.)

The Court has never indicated that the states must guide the exercise of discretion in a certain way or, as petitioner apparently contends, permit that exercise of discretion to be unbridled in determining the "appropriate" penalty. As recently noted in Franklin v. Lynaugh, supra, the Court "has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence

must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty." (Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at p. 170.) "Much in our cases suggests just the opposite." (Franklin v. Lynaugh, supra, 487 U.S. at ___, 101 L.Ed.2d at 170; see also Baldwin v. Alabama (1985) 472 U.S. 372, 374 (upholding the constitutionality of a "peculiar and unusual" statutory scheme); Turner v. Murray (1986) 476 U.S. 28 (in upholding the Virginia death penalty law which allows the sentencer to reject the death penalty if there are aggravating circumstances present, but no mitigating circumstances, the plurality noted that "Virginia's death-penalty statute gives the jury greater discretion than other systems which we have upheld

against constitutional challenge." (Id., at p. 34, citing Jurek v. Texas (White, J. plur.).)

Moreover, how, under petitioner's theory, would the jury make the determination that "death is the appropriate penalty" apart from the weighing process? If the jurors were only considering factors already encompassed by factors (a) through (k), a determination of appropriateness separate and apart from the weighing process would be meaningless. There would thus be a substantial risk that the jury was making its determination of "appropriateness" based on the same kind of arbitrary and capricious considerations which led to the Court's decision in Furman. As the California Supreme Court has observed, to instruct penalty phase jurors that they may ignore the outcome of the "weighing process" "comes perilously close to violating the

mandate of [Furman] that the jurors must be given specified standards or guidelines within which to focus their discretion . . . [and] would invite arbitrary decisions based on improper or irrelevant sentencing considerations . . . ."

(People v. Hendricks, supra, 44 Cal.3d 635, 654; see also State v. Ramseur (1987) 106 N.J. 123, 524 A.2d 188, 287 (fn. 81) (petitioner's argument would "undermin[e] the principle, also constitutionally mandated, that the death sentence be meted out in a manner that is not arbitrary or capricious."); State v. Tichnell (1986) 306 Md. 428, 509 A.2d 1179, 1199, cert. den., 479 U.S. 995 (1986), reh. den., 479 U.S. 1060 (1987) (". . . there would be no principled or rational way to differentiate the few cases in which the death penalty is justified from the many in which it is not.").)

Petitioner's argument that California's procedure is unconstitutional because the jury must consider appropriateness within the context of the weighing process, rather than as a separate and independent determination, twists this Court's jurisprudence inside out. He transforms permission to have "unbridled discretion" into a prohibition of any channeling of sentencer discretion whatsoever. In doing so, he advocates a third constitutional requirement of a separate and independent determination of "appropriateness" that will preclude legitimate state efforts to direct and guide sentencers in a rational and equitable fashion.[20/]

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20. The fallacy of petitioner's argument is shown by his revealing reliance on Winston v. United States (1899) 172 U.S. 303, for the proposition that requiring a separate and independent determination of appropriateness, i.e. whether the sentence is "just and wise," would be simply building on a foundation of

Petitioner's further contention that the Constitution requires that the jury be given the right to make an assessment of the "absolute weight of the aggravating circumstances," is equally unsound.

California law requires, on its face, only that aggravation outweigh mitigation, and does not require that aggravation attain any particular "absolute weight." (Pen. Code, § 190.3.) See People v. Hendricks, supra, 44 Cal.3d at p. 654 (jury under California law is to

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decisions by the Court "nearly a century old." (Petitioner's Brief, pp. 33-34.) Winston was decided at a time when juries had absolute and unbridled discretion in the determination of punishment, and could make penalty determinations based upon such factors as "sex" and untethered "sympathy." (Id., at pp. 312-313.) Until Furman, statutes generally left the matter of penalty to the absolute discretion of the jury. (McGautha v. California (1971) 402 U.S. 183.) Acceptance of petitioner's position would overturn Furman and all that has been decided by the Court since Furman.

weigh the applicable aggravating and mitigating factors and, "on that basis, and that basis alone, to determine whether death is an appropriate penalty." (Emphasis in original.) Under California law the prosecution is not required to prove that aggravation outweighs mitigation "beyond a reasonable doubt," or to any particular degree. (People v. Bonillas (1989) 48 Cal.3d 757, 790; People v. Jennings (1988) 46 Cal.3d 963, 992, mod. 47 Cal.3d 277a, cert. den., 103 L.Ed.2d 862 (1989); People v. Gates (1987) 43 Cal.3d 1168, 1201, cert. den., 100 L.Ed.2d 236 (1988); People v. Rodriguez (1986) 42 Cal.3d 730, 777-779.)

This Court has never held that aggravation must rise to some undefined "absolute weight," just as it has never held that aggravation must outweigh mitigation to any specific degree in order for a state's weighing process to pass

constitutional muster. (Harris v. Pulley, supra, 692 F.2d 1189, 1194-1195 (rev'd on other grounds, Pulley v. Harris, supra, 465 U.S. 37.) The Florida procedure upheld in Proffitt did not provide for anything more than a determination of whether aggravation outweighed mitigation, the same as California's. The Florida statute gave no guidance as to how the mitigating and aggravating circumstances should be weighed in any specific case. (Proffitt v. Florida, supra, 428 U.S. at p. 254 (plur. opn.).) The plurality opinion noted that while the various factors to be considered under Florida law "do not have numerical weights assigned to them," the requirements of Furman "are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus

eliminating total arbitrariness and capriciousness in its imposition." (Proffitt v. Florida, supra, 428 U.S. at p. 258.)

Moreover, in Zant the Court held that the Constitution is not violated by a capital sentencing scheme that permits unbridled jury discretion once the class of death-eligible defendants has been suitably narrowed. (Zant v. Stephens, supra, 462 U.S. 862, 875; see also California v. Ramos, supra, 463 U.S. at p. 1009, fn. 22.) "In other words, the 1978 California law would not contravene the Eighth Amendment even if it set no standards for the sentencing of defendants already deemed death-eligible." (People v. Rodriguez, supra, 42 Cal.3d at p. 778; emphasis in original; footnote omitted.) It follows that the factors in aggravation need not achieve any prescribed "absolute

weight" in order for California's law to satisfy constitutional requirements.

In reality, petitioner's argument is simply a restatement of his initial argument in a different guise: the Constitution requires that the jury have the right to determine "appropriateness" of the death penalty separate and apart from the weighing process prescribed by California law, if not explicitly as a separate and independent determination of "appropriateness" then as a matter of determining the "absolute weight" of the factors in aggravation.[21]

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21. Petitioner poses the hypothetical "scenario" where a juror views the circumstances in aggravation as substantial enough to "seriously consider" the death penalty and the mitigating circumstances as not "insubstantial," but not "compelling." He argues that the jury would be "required" to vote for death without having determined it to be "the just and appropriate punishment." (Petitioner's Brief, pp. 35-36.) The hypothetical is fatally flawed. First, it does not

Respondent urges the Court not only to uphold California's statute, but to reaffirm the position it took in Pulley

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state whether the juror has applied the weighing process and actually determined that the factors in aggravation outweigh those in mitigation, which is the statutory standard. Second, it assumes that the juror has not exercised any moral judgment in evaluating the factors in aggravation and mitigation or in weighing them against each other, contrary to the requirement of California law. Third, it assumes that a juror who concluded that the circumstances in aggravation outweighed those in mitigation, but who believed that death was not the appropriate penalty would not undertake to reweigh the circumstances in aggravation and mitigation to determine whether the juror really believed, in the exercise of the juror's moral judgment, that the circumstances in aggravation outweighed those in mitigation. Fourth, if a juror did reweigh the circumstances in aggravation against those in mitigation in the exercise of the juror's moral judgment, as required by California law, and finally concluded that the circumstances in aggravation truly did outweigh those in mitigation, nothing in the decisions of the Court requires that such a juror be given the option to determine "appropriateness" separate and apart from the statutorily prescribed weighing process and on that basis to return a sentence of life without parole.

v. Harris, supra, 465 U.S. at p. 45: "To endorse the statute as a whole is not to say that anything different is unacceptable." Indeed, there is no "right way for a State to set up its capital sentencing scheme." (Spaziano v. Florida (1984) 468 U.S. 447, 464.) "The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." (Ibid.)

Petitioner and amicus California Appellate Project (CAP) refer to Alameda County cases in which juries were instructed that they could find that the circumstances in aggravation outweighed those in mitigation, but that the "appropriate" sentence was nevertheless life without parole. Petitioner and amicus argue that in more than half of the 15 cases in which juries found that aggravation outweighed mitigation, the

jury returned a verdict of life without parole.

However, such forms of instruction and verdicts would necessarily cause a juror to believe that the weighing function was to be performed separate and apart from a determination of appropriateness. Such jurors would naturally assume that they were first to perform the weighing process as an abstract, mechanical proposition, divorced from any moral assessments, which would only be brought to bear in the second and independent assessment of "appropriateness." The first step of this two step process would involve only the "mechanical" counting of factors. (See People v. Brown, supra, 40 Cal.3d 512, 541.) Where such a procedure is used, a second step would be necessary as a matter of California law in order to assure that the jury exercised appropriate discretion

and moral judgment as part of the prescribed weighing process.

However, this two-step process is neither the rule in California nor constitutionally required. As the California Supreme Court held in the instant case, California juries are not required to make "two separate assessments in arriving at a penalty determination." (People v. Boyde, supra, 46 Cal.3d at p. 254.) Instead, the jury "makes its appropriateness determination during its normative weighing process." (Ibid.) The Alameda County cases cited by CAP do not support the proposition that a jury which makes moral assessments as part of a single weighing process, as did petitioner's, does not make an individualized assessment of penalty and a "reasoned moral response" to all the evidence before it. (Penry v. Lynaugh,

supra, ___ U.S. at ___, 57 U.S.L.W. at 4965 (plur. opn.).)

Alternatively, the Alameda County cases cited by CAP may be viewed as expressions of "mere sympathy," after the jury's initial determination of whether the circumstances in aggravation outweighed those in mitigation. (Cf. California v. Brown, supra, 479 U.S. 538, 542-543.)

What the Alameda County cases do not show is that petitioner's jury did not make an individualized determination of penalty in petitioner's case as part of a single "weighing" process as defined by the California Supreme Court in this and other cases.

Petitioner next argues that the challenged jury instruction cannot be saved by the arguments of counsel, citing Taylor v. Kentucky (1978) 436 U.S. 478, and Carter v. Kentucky (1981) 450 U.S.

540 (fn. *).)[22/] If the language of California Penal Code section 190.3 is constitutionally valid on its face, without the clarifying gloss subsequently added in People v. Brown, supra,[23/] it cannot be said that instructing the jury in the same language, as was done here, is constitutionally defective, such that arguments of counsel cannot be considered to determine whether the jury correctly understood its function under the statutory standard.

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22. As previously noted (see footnote 18, supra), the 1977 and 1978 versions of California's death penalty law do not differ in substance in the sentencing discretion afforded to juries. (People v. Murtishaw, supra, 48 Cal.3d 1001, 1025, 1029).

23. In People v. Brown, supra, 40 Cal.3d 512, 539, fn. 9, the California Supreme Court held that Penal Code section 190.3 was not unconstitutional on its face. However, it directed that "prophylactic" clarifying language be added in order to prevent any possibility of confusion concerning the jury's function. (People v. Brown, supra, 40 Cal.3d at p. 539, fn. 9, 544, fn. 17.)

Moreover, in California v. Brown, supra, 479 U.S. 538, it was just as true that the language of the instruction was valid on its face, but equally susceptible to clarifying gloss. It was proper to look to the arguments of counsel and the other instructions in that case to determine whether the jury applied a constitutionally invalid standard. (See Id., at p. 546 [O'Connor, J., concurring].) The issue here is not whether the instruction could have been made any clearer, but whether the jury was misled by an instruction which was constitutionally valid on its face, where the arguments of counsel clarified the jury's function under the statute.

The prosecutor made it clear to the jury that the question was one of "weighing", that nothing would tell the jurors "which factors are more important than other factors" or even "what

Moreover, in California v. Brown, supra, 479 U.S. 538, it was just as true that the language of the instruction was valid on its face, but equally susceptible to clarifying gloss. It was proper to look to the arguments of counsel and the other instructions in that case to determine whether the jury applied a constitutionally invalid standard. (See Id., at p. 546 [O'Connor, J., concurring].) The issue here is not whether the instruction could have been made any clearer, but whether the jury was misled by an instruction which was constitutionally valid on its face, where the arguments of counsel clarified the jury's function under the statute.

The prosecutor made it clear to the jury that the question was one of "weighing", that nothing would tell the jurors "which factors are more important than other factors" or even "what

specifically is aggravating or mitigating as opposed to what is not." (RT 4767-4768, J.A. 21.) Far from telling the jurors that they could not exercise any moral judgment in the weighing process, the prosecutor specifically urged the jurors to ask themselves:

> "Is this the case, is this the kind of case as I am guided by these factors <u>that warrants the death penalty</u>." (RT 4780; J.A. 24.)

He told the jury the question was "<u>should</u> it [the death penalty] or <u>should it not</u> be imposed." (RT 4820; J.A. 28.)

He urged the jury not to make a decision based on the "shifting sand" of mere sympathy, but rather to make a reasoned decision based on a "rational process" of weighing the 11 factors set forth by the law. (RT 4767, 4819, J.A. 21, 27-28.)

He told the jury that they might find that all the factors were in

aggravation, or that they might find that one factor mitigates, and that,

> "It is not a process of counting, it is a process of weighing. And you should decide whether or not that one factor in mitigation outweighs all those factors in aggravation and then decide the case." (RT 4825; J.A. 30; emphasis added.)

His last words to the jurors in his rebuttal argument were that they should ask themselves if the case "warrants the death penalty," and "'What would I like to have or not have more that would warrant it one way or the other.'" (RT 4826; J.A. 31; emphasis added.)

Petitioner's counsel also emphasized the jurors' discretion and the fact that the jury had to make a "qualitative analysis" and not "play a numbers game." The jury had to consider such things as "what causes a man to do what he does," because human beings "are extremely complex." (RT 4785-4787; J.A. 25.) He told the jurors they must look at

"the totality" of petitioner, that if the jurors treated the weighing process as a "mechanical process" they would "miss the whole thrust of it," and that they were free to find that the "catchall" factor (k) outweighed all the other factors. (RT 4789, 4829-4831; J.A. 26, 31-33.)

The California Supreme Court correctly concluded that the jury was not misled concerning its weighing function. (People v. Boyde, supra, 46 Cal.3d at pp. 253-255.)

Petitioner argues that other portions of argument of the prosecutor, as well as statements during the voir dire examination of certain jurors, misled the jurors.

Not only should voir dire statements of counsel not be considered in determining whether a jury correctly understood the penalty phase instructions given by a court (see Argument I, supra),

but petitioner again takes the prosecutor's voir dire remarks out of context and misconstrues their import. Thus, the prosecutor told Mr. Armas that the law provided "a very strict structure" and a list of "about nine or ten factors" for the jury to look at in deciding penalty, and that it was quite possible that if he were "writing the law" himself "on a blank slate," he might not think the death penalty was "appropriate, but yet the law says that it is." (RT 1159; J.A. 9.) This questioning was in the context of determining that the prospective juror would "apply that law even if you disagree with that law in a particular case," rather than each juror "debating whether they like the law or not like the law." (RT 1158-1159; J.A. 9.) The prosecutor was talking about the "appropriateness" of how the law was drafted.

The prosecutor similarly told Ms. Ash that under the prior law the jury could "decide for whatever reason they wanted" whether "to give the death penalty or life without possibility of parole" and that there were "no guidelines at all" under the former law. He referred to the "nine or ten factors" set forth in current law and the need to determine whether aggravation or mitigation outweighs. He stated his concern was "we could get twelve different ideas as to what the standard should be or what the law should be," and that "we can't spend days, years, tens of years trying to figure out if we like the law and if we are going to apply it." He suggested that if she had it to do personally, she "might not write the law that way," but that when she looked at the "factors" she might be "required to return a penalty of death." He asked her if she could put aside what "you

personally feel" and "follow the law even in that situation." (RT 1976-1977, J.A. 17-18.)

As the California Supreme Court correctly concluded, each statement

> "was a result of the prosecutor's contrasting the current death penalty law with the former one that was unconstitutional for lack of standards governing the jury's exercise of discretion in sentencing. (See Furman v. Georgia (1972) 408 U.S. 238 [33 L.Ed.2d 346, 92 S.Ct. 2726].) He was attempting to explain that the current law does not leave jurors 'rudderless,' but instead provides concrete standards to guide the jury's exercise of discretion." (People v. Boyde, supra, 46 Cal.3d at p. 254, fn. 6.)

In argument, the prosecutor properly told the jury that the test was simply "whether aggravating outweighs mitigating or mitigating outweighs aggravating," and that "it can be a slight outweigh." (RT 4767; J.A. 20-21.) The prosecutor correctly noted that under California law, "There is no requirement

that I have to prove that the aggravating outweighs beyond a reasonable doubt, beyond clear and convincing evidence," or any other such standard. It was "merely a question of weighing." (RT 4767; J.A. 21; emphasis added.)

These were not statements which in any way "improperly described the role assigned to the jury by local law." (Dugger v. Adams (1989) 489 U.S. ___, 103 L.Ed.2d 435, 443, citing Caldwell v. Mississippi, supra, 472 U.S. 320; see also Darden v. Wainwright, supra, 477 U.S. 168, 184, fn. 15.) There is no requirement under California law that aggravation must outweigh mitigation by any particular degree, such as beyond a reasonable doubt. (People v. Bonillas, supra, 48 Cal.3d 757, 790; People v. Jennings, supra, 46 Cal.3d 963, 992; People v. Gates, supra, 43 Cal.3d 1168, 1201; People v. Rodriquez, supra, 42 Cal.3d 730, 777-779.) The

California Supreme Court has held that there is no misstatement of California law when a prosecutor informs the jury that it is to weigh the applicable aggravating and mitigating factors and, "on that basis, and that basis alone, to determine whether death is an appropriate penalty." (People v. Hendricks, supra, 44 Cal.3d 635, 654; emphasis in original.) The prosecutor's statement here in no sense incorrectly diminished the sense of the jury's true responsibility under California law; it accurately stated the precise nature of that responsibility.

Finally, even assuming, arguendo, that there was any federal constitutional error in either of the instructions, it was harmless under the circumstances of the case. (Chapman v. California (1986) 386 U.S. 18, 24; Satterwhite v. Texas (1988) 486 U.S. 249.) In Hitchcock v. Dugger (1987) 481 U.S.

393, 399, the Court implied that the sentencer's failure to consider mitigating evidence under Skipper, Eddings and Lockett, may be harmless error. (See also People v. Hamilton, supra, 46 Cal.3d 123, 148-149, cert. den., ___ U.S. ___, 103 L.Ed.2d 238 (1989)(applying Chapman test where jury was misled into believing it could not consider defendant's mitigating evidence under factor (k), and finding error harmless); People v. McLain (1988) 46 Cal.3d 97, 109, cert. den., ___ U.S. ___, 103 L.Ed.2d 824 (holding Skipper error harmless under Chapman test); People v. Guzman, supra, 45 Cal.3d 915, 958, cert. den., ___ U.S. ___, 102 L.Ed.2d 1005 (1989) (any factor (k) error was harmless under Chapman).) (Cf. People v. Brown (1988) 46 Cal.3d 432, 446-449, cert. den., ___ U.S. ___, 103 L.Ed.2d 597 (1989) (distinguishing between the test of prejudice applicable to state law errors

occurring at the guilt phase of trial, and, as a matter of state law, applying a "reasonable possibility" test of prejudice to penalty phase error which does not amount to federal constitutional error).)

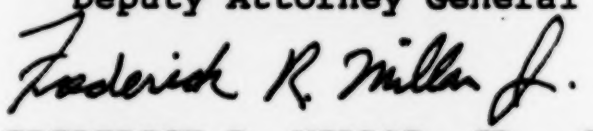
In petitioner's case, the evidence in aggravation was overwhelming, while the mitigating evidence was anemic and pales in comparison. If it were necessary for the Court to reach the issue, any asserted federal constitutional error could and should be held harmless beyond a reasonable doubt. (Chapman v. California, supra, 386 U.S. 18, 24; Satterwhite v. Texas, supra, 486 U.S. 249. However, respondent emphasizes that in its view there was no federal constitutional error in the instructions.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of California should be affirmed.

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California
RICHARD B. IGLEHART, Chief Assistant
Attorney General
HARLEY D. MAYFIELD, Senior Assistant
Attorney General
JAY M. BLOOM, Supervising
Deputy Attorney General



FREDERICK R. MILLAR, JR., Supervising
Deputy Attorney General

Attorneys for Respondent

FRM:cg